Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Consumer Banking Association's Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	**CG Docket No. 02-278** **DA 04-3185**

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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SUMMARY

These comments address issues raised by the Wisconsin Attorney General. The TCPA preempts Wisconsin laws that are more restrictive than the Commission's regulations governing interstate telemarketing. When Congress enacted the TCPA, it clearly believed that more restrictive state laws governing **inter**state telemarketing were **already** preempted. Although Congress could have, it included nothing in the TCPA to alter that state of affairs, despite expressly reserving to the states the authority to enact more restrictive laws governing **intra**state telemarketing. Therefore, Congress' intent was to affirm preemption of interstate telemarketing. At a minimum, Congress intended to create a uniform, national scheme as applicable to interstate telemarketing.

Any Commission preemption determination resulting from this proceeding would be legally effective and entitled to deference. That deference is bolstered because the TCPA expressly gave the Commission authority to administer the TCPA and further directed it to conduct a rulemaking in furtherance of that authority. A Commission determination of preemption would be reasonable and consistent with congressional intent.

The regulatory regime established in the TCPA and as implemented by the Commission carefully balances consumer privacy with commercial interests in legitimate telemarketing activity. Wisconsin's laws, as applicable to interstate telemarketing, frustrate that careful regulatory balance. The Wisconsin Attorney General does not present any arguments that warrant permitting it to enforce its more restrictive laws when applied to interstate telemarketing.

Finally, the Eleventh Amendment does not apply to this Commission proceeding. An administrative declaratory judgment proceeding regarding preemption is not an "adjudicative proceeding" under the Eleventh Amendment.

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REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter" or the "Company"), by its attorneys, hereby submits these Reply Comments in the above-referenced proceeding. The Reply Comments specifically address the Comments submitted by the Wisconsin Attorney General ("Wisconsin A.G.") opposing the Consumer Banking Association's ("CBA") Petition for Declaratory Ruling. The Wisconsin Attorney General's preemption analysis is misleading in its approach both to the preemptive effect of the Telephone Consumer Protection Act ("TCPA") and any forthcoming Commission decision to preempt.

Congress did not include an express preemption provision in the TCPA because one was not needed – states do not have authority over interstate telemarketing. Accordingly, the TCPA can only be properly viewed against the backdrop of the Communications Act generally and the Commission's authority over interstate communications.

In addition, the Wisconsin Attorney General's various policy arguments and attempts to downplay the differences between Wisconsin's laws and the Commission's rules are neither accurate nor persuasive. As explained in Charter's initial Comments, there are real and significant differences that restrict legitimate business activities in which companies like Charter could otherwise engage. These are activities that the Commission, after a thoughtful and careful balancing of competing interests – consistent with Congress' intent – expressly allows. Accordingly, a decision by the Commission to preempt those aspects of Wisconsin law at issue would be legally binding.

Wisconsin will still be able to regulate intrastate telemarketing in any way it deems appropriate. It should not, however, be allowed to subject Charter and other companies that comply with the Commission's regime for protecting consumer privacy to inconsistent and unreasonably burdensome restrictions that frustrate the objectives of Congress and the Commission.

I. THE TCPA PREEMPTS MORE RESTRICTIVE STATE LAWS GOVERNING TELEMARKETING

In arguing that Wisconsin's more restrictive regulation of interstate calls is not preempted, the Wisconsin Attorney General does not properly assess the context, goals and purposes of the TCPA. Preemption occurs when Congress, in enacting a federal statute, intends to preempt state law, whether explicitly or implicitly through the statute's structure and purpose.[1] Absent express preemption, the U.S. Supreme Court has recognized two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to create the inference that Congress left no room for states to supplement it, and conflict preemption.[2]

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[1] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

[2] *Gade v. Nat. Solid Waste Mgt. Ass'n*, 505 U.S. 88, 98 (1992).

Conflict preemption involves a disjunctive two-part test, requiring preemption of state law that conflicts with federal law, either because "compliance with both federal and state regulations is a physical impossibility" (direct conflict) or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (obstacle preemption).[3] Under either type of implied conflict preemption analysis (direct conflict or obstacle preemption), it is necessary to assess the goals, policies, structure and purpose of the statute at issue to determine Congressional intent.[4]

The TCPA presents a unique preemption situation. Congress correctly believed that the Communications Act **already** preempted states from regulating **inter**state calls. Therefore, its enactment of the TCPA, with a savings clause addressing only more restrictive regulation of **intra**state calls, reflected its clear intent to continue the status quo of interstate preemption. Given the Communications Act already preempted more restrictive state regulation of interstate calls, Congress was free to enact a savings clause that included interstate calls. That approach would have eliminated the Communications Act's interstate preemptive force. Congress did not do so. Any assessment of the TCPA's preemptive effect requires an examination in this context.

A. The Communications Act Granted The Commission Exclusive Regulatory Jurisdiction Over Interstate Communications

The reason there is no explicit preemption clause in the TCPA is because Congress properly understood that states did not have jurisdiction over interstate telephone solicitations by phone. Section 2(a) of the Communications Act effectively provides the Commission with jurisdiction over "**all interstate ... communications** by wire or radio ... and to all persons

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[3] *Id.*

[4] *Id. See also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987).

engaged within the United States in such communication."[5] "Interstate Communication" is defined in pertinent part as "communication or transmission" from one state to another[6] while communications by wire or radio encompasses transmissions of "writing, signs, signals, pictures and sounds of all kinds."[7] As the Supreme Court has explained, "the Commission has been given '**broad responsibilities**' to regulate **all aspects** of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a)."[8] Accordingly, an interstate telephone solicitation call is clearly an interstate communication subject to Commission authority.[9] Conversely, Section 2 of the Communications Act permits states to retain jurisdiction over certain aspects of "**intrastate communication service** by wire or radio."[10] The crux of most disputes involving exercise of the Commission's preemptive authority under the Communications Act has involved attempts to regulate or restrict intrastate communications.[11]

When enacting the TCPA, Congress' belief in the lack of state authority over interstate calls was unquestionably pervasive.[12] Indeed, that was a primary reason Congress passed the TCPA. The TCPA itself expresses this understanding: "[T]elemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential

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[5] 47 U.S.C. § 152(a) (emphasis added).

[6] *Id.*

[7] 47 U.S.C. §§ 153(33) and (52).

[8] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968)) (emphasis added).

[9] *See, e.g., Wentz v. United States*, 244 F.2d 172 (9th Cir. 1957) (finding a telegraph that crossed state lines to meet the Communication Act's definition of an interstate communication).

[10] 47 U.S.C. § 2(b) (emphasis added).

[11] *See, e.g., AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); *Louisiana P.S.C. v. FCC*, 476 U.S. 355 (1986); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1933).

[12] *See* Charter Comments at 11-12.

telemarketing practices."[13] The TCPA's legislative history confirms Congress' belief in its inability to regulate interstate calls. The Senate Report to S. 1462 explained that:

> [State laws] have had limited effect ... because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls. *** Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who ... place interstate telephone calls.[14]

There is also evidence that Congress specifically intended for the TCPA to preempt more restrictive state regulations of interstate commerce:

> To ensure a uniform approach to this nationwide problem, H.R. 1304 would preempt inconsistent State law. From the industry's perspective, preemption has the important benefit of ensuring that telemarketers are not subject to two layers of regulation.[15]

In addition,

> Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject to § 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications including interstate communications initiated for telemarketing purposes is preempted.[16]

B. Through the TCPA, Congress Affirmed Preemption of Interstate Telemarketing Calls

Congress did include a savings clause in the TCPA to expressly allow more restrictive state regulation of intrastate calls.[17] Despite Congress' clear belief that any state law regulation

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[13] 47 U.S.C. § 227 nt. (Congressional Finding (7)).

[14] S. Rep. 102-178 at 3, 5 (1991). *See also* Cong. Rec. S16205 (Nov. 7, 1991) (remarks of Sen. Hollings) ("State law does not, and cannot, regulate, interstate calls.").

[15] 137 Cong. Rec. H10339 (Nov. 18, 1991)(remarks of Rep. Rinaldo).

[16] 137 Cong. Rec. S 18781 (Nov. 27, 1991) (remarks of Sen. Hollings).

[17] 47 U.S.C. § 227(e)(1).

of interstate telemarketing was preempted, Congress did not enact a broader savings clause to also reference interstate calls. In passing the TCPA, Congress therefore affirmed the pre-existing regime of preemption of more restrictive state laws governing interstate calls. For interstate calls, Congress was clearly comfortable that its new national statutory scheme would adequately protect customers and properly balance the interests of consumers and telemarketers. Congress' intent was not ambiguous.

C. Given Congress' Affirmation of More Restrictive Interstate Solicitation Calls, the TCPA Preempts Wisconsin Laws

Given the preemptive background under which Congress enacted the TCPA, at a minimum, Wisconsin's laws stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[18] The objective of Congress was to protect consumer privacy in a way that balanced the interests of businesses to engage in legitimate telemarketing activity.[19] Congress accomplished this objective by providing national standards that would apply both to intrastate and interstate calls. In recognition of states' interests in consumer protection, Congress, through the TCPA's savings clause, permitted states to have a complementary role in implementing and enforcing telemarketing laws by allowing states to enact more restrictive laws for intrastate calls. This approach provided "due recognition for the traditional authority of the States ... to regulate some matters of local concern.[20] At the same time, Congress affirmed its understanding of the preemptive effect of the Communications Act on states' roles in governing interstate calls.

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[18] *Gade v. Nat. Solid Waster Mgt. Ass'n*, 505 U.S. 88, 98 (1992).

[19] 47 U.S.C. § 227 nt. (Congressional Finding (9)).

[20] *United States v. Locke*, 529 U.S. 89, 104 (2000).

The TCPA presents issues analogous to those addressed by the Supreme Court in *City of New York v. FCC*.[21] As in the case of the TCPA and Congress' understanding of the preemptive effect of the Communications Act on interstate communications, in *City of New York*, Congress had passed legislation (the 1984 Cable Act) "against a background of federal pre-emption on [the] particular issue."[22] The Court found it significant "that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the [existing] pre-emption [regime]."[23] As the Court explained, "we doubt that Congress intended to overturn the ... decade-old policy [of preemption] without discussion or even any suggestion that it was doing so."[24] Although in *City of New York*, the Court was considering preexisting preemption by the Commission and not Congress, the reasoning is precisely the same – a subsequent statutory enactment ratified the existing preemption framework without an explicit expression of preemption. Accordingly, states are preempted from applying more restrictive laws to interstate telemarketing.[25]

D. The TCPA's Objectives Demonstrate Preemption is Warranted

Charter does not dispute the Wisconsin Attorney General's assertions that consumer privacy is one of the primary objectives of the TCPA – clearly it is.[26] As explained in Charter's initial comments, however, another important objective of Congress was to balance those privacy

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[21] 486 U.S. 57 (1988).

[22] *Id.* at 67.

[23] *Id.*

[24] *Id.* at 68.

[25] Congress' ratification of the existing framework through the TCPA and the lack of any disapproval of the pre-existing preemption regime demonstrates why 47 U.S.C. § 227(e)(1)(D), which does not reference interstate calls, does not bar preemption.

[26] Wisconsin A.G. Comments at 7-8.

interests in a way that "permits legitimate telemarketing practices."[27] In defending the application of Wisconsin's unduly restrictive laws to interstate telemarketing, the Wisconsin Attorney General conveniently ignores this additional mandate. To achieve both of these goals, Congress implicitly preempted more restrictive state law regulation of interstate solicitation calls and established a single, uniform regime governing them.

The Wisconsin Attorney General also wrongly concludes that because Wisconsin law and the TCPA share the objective of consumer privacy and protection, the TCPA cannot preempt those laws. That is not determinative of preemption. To the contrary, "it is not enough to say that the ultimate goal of both federal and state law [are the same]."[28] Regardless of the similarities, state law will still be preempted if it interferes with the statute's methods of achieving its goals.[29] This requires assessing "whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation."[30] If the state law "upset[s] the balance of ... interests so carefully addressed by the Act" it is preempted.[31] Wisconsin's more restrictive approach to interstate solicitation calls conflicts with Congress' intent to establish a national scheme for regulating intrastate and interstate telephone solicitations which did expressly preserve state authority over intrastate calls.

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[27] Charter Comments at 10 (quoting 47 U.S.C. § 227 nt. (Congressional Finding (9))).

[28] *Int'l Paper Co. v. Ouellete*, 479 U.S. 481, 494 (1987).

[29] *Id.* at 494.

[30] *U.S. v. Locke*, 529 U.S. 89, 109 (2000).

[31] *Ouellette*, 479 U.S. at 494.

E. The TCPA Savings Clause Does Not Prove Intent Not to Preempt

The Wisconsin A.G. argues that the savings clause demonstrates that "Congress considered and rejected, express preemption of state laws."[32] The Supreme Court has cautioned against "plac[ing] more weight on the savings clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme" at issue.[33] In fact, the Supreme Court "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."[34] The "savings clause ... does *not* bar the ordinary working of conflict preemption principles."[35] It is therefore important to examine the entire framework of the statutory scheme and the savings clause's place in that framework. In particular, if the savings clause is qualified in a way that "is inconsistent with interpreting the savings clause[] to alter the pre-emptive effect of the [earlier statute]" then it will not do so.[36]

The savings clause in the TCPA only allows states to have more restrictive laws governing intrastate telemarketing. As mentioned above, this is consistent with Congress' understanding that the Communications Act preempted more restrictive state regulation of interstate calls. What is of primary significance is that in passing the TCPA, Congress did

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[32] Wisconsin A.G. Comments at 3.

[33] *United States v. Locke*, 529 U.S. 89, 100 (2000).

[34] *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000).

[35] *Id.* at 869.

[36] *Id.* at 106.

nothing to alter preemption of interstate calls.[37] The savings clause therefore counsels in favor of preemption.[38]

Van Bergen v. Minnesota, cited by the Wisconsin A.G., is inapposite on this point.[39] In *Van Bergen*, a Minnesota politician wanted to reach in-state voters through automatic dialing-announcing devices ("ADAD") in his bid to become governor. However, a Minnesota law prevented Van Bergen from making ADAD calls. Van Bergen brought suit and "argue[d] that the Minnesota statute is **less restrictive** than the TCPA, and is therefore preempted by the TCPA."[40] Accordingly, the issue before the Eighth Circuit was a very different one than the Commission is considering now. The court's conclusions on the effect of the savings clause and the preemptive impact of the TCPA was irrelevant to whether a **more restrictive** state statute governing **inter**state conduct is preempted by the TCPA.[41]

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[37] *See* subpart C. *supra* (discussing *City of New York v. FCC*, 486 U.S. 57, 67-68 (1988).

[38] Although not mentioned by the Wisconsin A.G., it is worth noting that it is of no significance that an earlier version of the TCPA included an express preemption clause for interstate calls, which was not in the final bill. The most likely reason for the deletion of the provision is that, given Congress' understanding of the preemptive effect of the Communications Act, the clause would have been merely superfluous and, therefore, unnecessary. *See United States v. Craft*, 535 U.S. 274, 287 (2002) (cautioning against establishing Congressional intent from revisions to legislation "because several equally tenable inferences may be drawn" including "the inference that the existing legislation already incorporated the offered change."). *See also European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, 134 (2d. Cir. 2004).

[39] 59 F.3d 1541 (8th Cir. 1995).

[40] *Id.* at 1547 (emphasis added).

[41] The Eighth Circuit's assessment in *Van Bergen* that Congress did not intend to promote national uniformity because "it expressly [did] not preempt state regulation of intrastate ADAD calls that differs from federal regulation" only speaks to national uniformity toward intrastate calls. The court never assessed whether Congress' intent was to preempt regulation of interstate calls that stood as an obstacle to the uniform national scheme it had created in the TCPA. In addition, the Eighth Circuit's conclusion that the two statutes were not in "actual conflict," *i.e.*, "there is nothing in the two statutes that creates a situation in which an individual cannot comply with one without violating the other" – speaks only to direct conflict preemption, not obstacle preemption. *Van Bergen*, 59 F.3d at 1548.

F. The Presumption Against Preemption Is Not Applicable

The Wisconsin A.G. over emphasizes the presumption against preemption.[42] As the Wisconsin Attorney General point out, the presumption is overcome when preemption "was the clear and manifest purpose of Congress."[43] As explained above, Congress manifested a clear and manifest purpose to continue preemption of more restrictive state laws applicable to interstate calls when it did not enact a more expansive savings clause.[44] Therefore, it is irrelevant whether Wisconsin's laws relate to an area involving its traditional authority: "any state law, however clearly within a State's acknowledged power, which interferes with, or is contrary to federal law, must yield."[45]

Also, the Supreme Court has clearly stated that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."[46] As explained earlier, the Communications Act has provided longstanding federal jurisdiction over interstate communications. Accordingly, the presumption against preemption does not apply in these circumstances.[47]

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[42] Wisconsin A.G. Comments at 1-2.

[43] *Id.* at 2 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977)).

[44] The same reasoning would apply even assuming Congress was incorrect about the Communication Act's preemptive effect. It is Congress' intent, informed by its beliefs and understandings, express or implied, that is of utmost importance in preemption analysis.

[45] *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 108 (1992). It is also noteworthy that Congress, in the TCPA, did not negate states' roles entirely. Through the savings clause it specifically preserved power over intrastate telemarketing calls. Therefore, states' ability to regulate has not been altogether abrogated. This weakens the imperative of the presumption.

[46] *United States v. Locke*, 529 U.S. 89, 108 (2000).

[47] If the Commission decides to preempt Wisconsin's more restrictive laws applicable to telemarketing calls, its decision would further negate any presumption against preemption. For example, in *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), the Supreme Court determined that a state consumer protection statute regarding advertising was not preempted by the Commission. Significantly, however, the Commission had not regulated the

II. A COMMISSION DECISION TO PREEMPT WOULD BE LEGALLY EFFECTIVE.

For the same reasons explained above, a Commission decision to preempt Wisconsin laws would be in accord with the TCPA and Congress' clear intent to preempt more restrictive state laws as applied to interstate calls. However, even if there were some measure of ambiguity,[48] a Commission decision to preempt Wisconsin's more restrictive laws as applied to interstate calls would be legally binding.

A. A Commission Decision to Preempt Would Be Reasonable and Therefore Entitled to Deference

"Federal regulations have no less preemptive power than federal statutes."[49] "A federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."[50] Significantly, "a pre-emptive regulation's force does not depend on express

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conduct at issue. The Court concluded that it was "satisfied that the state statute, at least so long as any power the [Commission] may have remains dormant and unexercised, will not frustrate any part of the purpose of the federal legislation." *Id.* at 432 (quotations omitted). Subsequent cases have cited *Head* in noting the extent of Commission preemption when it explicitly acts to preempt. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 n. 10 (1984) (contrasting *Head* with the situation where "the FCC's pre-emptive intent could not be more explicit or unambiguous."); *Brookhaven Cable TV, Inc. v. Kelley*, 428 F. Supp. 1216, 1223 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *Cert. denied sub nom. NARUC v. Brookhaven Cable TV, Inc.*, 441 U.S. 904 (1979) (noting that *Head* "merely found that the Commission had not, in fact, exercised its power to preempt.").

[48] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, ¶ 82 ("*TCPA Order*").

[49] *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982).

[50] *United States v. Locke*, 429 U.S. 89, 110 (2000) (quoting *City of New York v. FCC*, 486 U.S. 47, 63-64 (1988)).

Congressional authorization to displace state law.[51] Therefore, a "narrow focus on Congress' intent to supersede state law is misdirected."[52]

Courts will give a Commission decision to preempt deference unless Congress has addressed the precise matter at issue.[53] However, where "Congress has not spoken directly to the issue and the statute is silent or ambiguous, [a court will] not impose [its own] construction of the statute."[54] Instead, it will be "obliged to defer to the interpretation of an ambiguous statute by the agency charged with the responsibility for administering it as long as the agency's interpretation is based upon a permissible reading of that statute."[55]

The Supreme Court has granted some measure of agency deference, whether explicitly based on *Chevron* or otherwise, when holding that a federal agency has preempted state law.[56] For example, in *City of New York*, although the Court did not invoke *Chevron*, it upheld Commission preemption of local regulation of cable television signal, and explained:

> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to

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[51] *De La Cuesta*, 458 U.S. at 154.

[52] *Id.*

[53] *Time Warner Cable v. Doyle*, 66 F.3d 867, 876 (7th Cir. 1995) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

[54] *Id.*

[55] *Id.* (citing *Chevron*, 467 U.S. at 843). *See also Lynnbrook Farms v. SmithKline Beecham*, 79 F.3d 620, 624 (7th Cir. 1996)(affirming USDA's decision to preempt state laws regarding animal vaccines, finding "Congress clearly intended that there be national uniformity in the regulation of these products" and holding that where "Congress has directed an administrator to exercise his discretion, and the administrator promulgates regulations intended to preempt state law, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.")(citing *De La Cuesta*, 458 U.S. at 154-55); *Smiley v. Citibank*, 517 U.S. 735, 739 (1996).

[56] *See e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000); *City of New York v. FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Savings & Loan Assoc. v. De La Cuesta*, 458 U.S. 141 (1982).

> reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, "if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[57]

The Wisconsin A.G. claims preemption would be "unreasonable or at odds with true Congressional intent" but provides no substantive support for that claim.[58] Instead, it asserts that because "[t]he FCC cannot reasonably infer" that the "**sole purpose** of the TCPA" is to "create a single, uniform regime of interstate telemarketing regulation" preemption "must fail."[59] The Wisconsin A.G. does not cite, and we were unable to find, any authority stating that the "sole purpose" of a statute must be to create a uniform regime for it to have preemptive effect. As already discussed, preemption would be reasonable and in accord with the TCPA's various objectives, including protection of consumer privacy,[60] protecting legitimate business telemarketing activity,[61] preserving state authority over traditional consumer protection laws for intrastate calls,[62] and leaving unaltered the Communication Act's preemption of interstate communications.[63]

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[57] *City of New York*, 486 U.S. at 64 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961) and *citing Crisp*, 467 U.S. at 700). *See also Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) (upholding Federal Election Commission's clarification that Federal Election Campaign Act preempted state law); *Lynnbrook Farms*, 79 F.3d at 625-26.

[58] Wisconsin A.G. Comments at 10.

[59] *Id.* (emphasis added).

[60] 47 U.S.C. § 227 nt. (Congressional Finding (5)).

[61] *Id.* (Congressional Finding (9)).

[62] *Id.* at § 227(e)(1).

[63] *See* Part I.A & B *supra*.

B. The Declaratory Judgment Process Affording Notice and Comment Adds Weight to the Commission's Preemption Decision

The Wisconsin A.G. does not recognize the particular weight courts afford agencies when the preemption decision is the result of a reasoned agency notice and comment proceeding. This is particularly true when Congress has delegated to the agency rulemaking authority to implement the statute.[64] However, even when that has not occurred, courts afford agency decisions deference.

In *Geier v. American Honda Motor Corp.*, the Supreme Court permitted agency preemption in a situation far more intrusive on state authority than in the present situation. The Court found a Department of Transportation (DOT) safety standard that did not express any intent to preempt common-law tort suits to be the basis for preempting such suits despite a specific savings clause preserving state common-law tort suits. The DOT had not even considered preemption when promulgating the standard. The Court placed great weight on DOT's subsequently expressed interpretation of the safety standard's objectives, including its belief that a tort suit would "stand as an obstacle to the accomplishment and execution of those objectives."[65] The Court also found it important that Congress had delegated to DOT authority to implement the statute.[66] Even the dissenting Justices seemingly would have considered preempting the suits if notice and comment procedures had been followed:

> [I]n cases where implied regulatory pre-emption is at issue, we generally expect an administrative regulation to declare any intention to pre-empt state law with some specificity. *** This expectation ... serves to ensure that States will be able to have a

[64] *Geier v. American Honda Motor Corp.*, 529 U.S. 861 (2000).

[65] *Id.* at 883.

[66] *Id.*

> dialog with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedures Act (APA) *** Requiring the [agency head] to put his preemptive position through formal notice-and-comment rulemaking – whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent – respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement[s].[67]

Given the structure and context of the TCPA, the Commission's explicit rulemaking authority, its designation as the agency responsible for implementing the TCPA, and its separate notice and comment proceedings to address the preemption issues before it now, courts would afford its preemption decision significant deference.

III. THE WISCONSIN ATTORNEY GENERAL'S VARIOUS POLICY ARGUMENTS ARE NOT PERSUASIVE

The Wisconsin A.G. devotes a significant part of its comments to presenting various policy arguments, including the strong support of Wisconsin's laws by its residents, that preemption would leave Wisconsin residents unprotected from telemarketing, and that the Commission approach is anticompetitive.[68] Wisconsin also attempts to downplay the differences between its laws and the Commission's rules. None of these arguments are persuasive.[69] The focus of preemption analysis is on Congress' intent.[70] Where Congress intended that more restrictive state regulation of interstate telemarketing be preempted or where state laws stand as an obstacle to the statutory scheme, then those conflicting laws are preempted. The

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[67] *Id.* at 908-910, 912 (J. Stevens, dissenting).

[68] Wisconsin A.G. Comments at 11-19.

[69] Wisconsin's policy arguments are of the type that a court would not countenance in its preemption assessment. *See, e.g., New York v. FERC*, 535 U.S. 1, 24 (2002).

[70] *De La Cuesta*, 458 U.S. at 152-153.

Commission, in promulgating the *TCPA Order*, has already considered and carefully weighed many of the same issues raised by the Wisconsin A.G.

A. The Wisconsin Laws Places Extra Burdens on Businesses Engaged in Interstate Solicitation Calls

As explained in Charter's initial comments, Wisconsin's telemarketing laws are more restrictive than the Commission rules and inhibit Charter's ability to reach its customers through lawful and valid telemarketing.[71] The Wisconsin A.G. attempts to downplay the differences in its exemptions as "possibly less expansive" than the Commission's rules.[72] However, Wisconsin's exemptions are unquestionably less expansive and clearly not "designed to avoid unnecessary burdens on the business community."[73]

For example, Wisconsin claims that its laws adequately protect interstate callers because businesses can call existing customers about "the same general type (not necessarily the *exact* type)" of service the customer already receives.[74] It further explains that calls about "different or additional products or services" are acceptable if "reasonably related to the current agreement." These claims are belied by the example in its regulations and the informal guidance its staff has provided.[75] For instance, Charter intends to only call customers about the same general type of service its customer already receive – *i.e.*, broadband communications services. However, in almost all circumstances, that would violate Wisconsin law.[76] Complying with various differing

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[71] *See, e.g.*, Charter Comments at 4 and 6-7.

[72] Wisconsin A.G. Comments at 12.

[73] *Id.*

[74] *Id.* at 13 (emphasis in original).

[75] *See* Charter Comments at 4.

[76] *Id.*

state laws, when the Commission already has provided significant consumer protections in its rules, interferes with companies' ability to efficiently conduct their lawful business operations.

B. The Scope of the Existing Business Relationship Exception and the Ban on Affiliate Calling are Unreasonable.

The Commission, in the rulemaking process leading up to the *TCPA Order*, carefully considered the scope of the existing business relationship ("EBR") exception, and affiliate calling and reached reasonable conclusions. The Commission concluded that companies like Charter that offered bundled services should be able to communicate with its customers about its service offerings.[77] The Commission in reaching these conclusions followed Congress' directive to balance commercial freedoms of speech and trade in a way that protects privacy and permits legitimate telemarketing practices.[78] Despite the Wisconsin A.G.'s assertions, the Commission's EBR exception is not anticompetitive – it simply recognizes the relationship a company has with its clients and customers.

Wisconsin also fails to recognize the restrictive effect of its affiliate prohibition. It claims that consumers do "not favor unsolicited telemarketing calls, for unrelated products and services, from **potentially far-flung and unknown 'affiliates'** of a seller."[79] Its rule, however, punishes closely related, same-branded affiliates that work together with other affiliates to operate as one cohesive unit. For example, customers are familiar with "Charter" but may not know that different services, such as Charter telephony services and Charter video and Internet services, are provided by different Charter affiliates over the very same broadband facilities.

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[77] *TCPA Order* ¶ 116.

[78] 47 U.S.C. § 227 nt. (Congressional Findings (9)) and *TCPA Order* at ¶ 113 (Commission attempting to "strike[] an appropriate balance between industry practices and consumers' privacy interests.").

[79] Wisconsin A.G. Comments at 15 (emphasis added).

These are not far-flung, unknown affiliates hawking completely unrelated products. The Commission's approach, which avoids a bright-line test but focuses on a "reasonable expectations," allows for situations like Charter's.

C. Preempting Wisconsin's More Restrictive Laws for Interstate Calling Would Not "Effectively 'Gut'" Protections for Consumers from Telemarketing Calls

Despite evidence that the federal Do Not Call and associated rules have been extremely effective in reducing unwanted telemarketing, Wisconsin, without any evidence, nonetheless argues that preempting more restrictive Wisconsin laws governing interstate telemarketing calls would "effectively gut" protections for Wisconsin consumers. That impression is misguided. Wisconsin consumers would continue to enjoy the full effect of federal protections, which, contrary to Wisconsin's apparent belief, are significant. In fact, the widespread view is that the Commission's rules and the Federal Do Not Call program have been a resounding success.[80]

Moreover, federal preemption would only impact interstate calls. All laws governing intrastate calls would remain in full force and effect, consistent with the express intent of the TCPA. This would still have a significant impact on companies like Charter who operate in Wisconsin. Charter intends to continue abiding by the State No Call laws for all intrastate telemarketing campaigns, even if interstate calls are preempted. Charter generally only makes interstate calls in campaigns that are part of its national or regional initiatives in furtherance of broadband deployment.

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[80] *See, e.g.*, United States Government Accountability Office (GAO) Report to Congressional Committees, *Telemarketing, Implementation of the National Do-Not-Call Registry* at 5 (January 2005) (referring to survey results reflected a significant reduction in unwanted telemarketing calls). The GAO did state that the survey data was unscientific but the findings conform with anecdotal reports of consumer satisfaction.

D. The Company Specific No Call List is An Effective Supplement to the National Do Not Call Registry

The Company Specific Do Not Call provision in the Commission's rules adequately protects consumers who do not want to receive calls from companies with whom they do business. The Wisconsin A.G. misleadingly states that "the FCC has already found that this does not effectively protect consumer rights."[81] That is wrong. What the Commission actually said in enacting its current rules was that it "agrees with those commenters that contend that the company-specific do-not-call approach has not proven ideal **as a stand-alone method** to protect consumer privacy."[82] The Commission decided to retain the company-specific option, noting that the "measures adopted elsewhere in this order will enhance the effectiveness of the company-specific list."[83] Those other measures included allowing consumers to block calls from any company with whom it does not have an existing business relationship. The Commission "conclude[d] that retention of the company-specific do-not-call rules will **complement** the national do-not-call registry by providing customers with an additional option for managing telemarketing calls."[84]

The Wisconsin A.G. seems to believe not only that every company who has a business relationship with the customer will call the customer, but that such companies will do so in a harassing, annoying and "unlimited" manner.[85] This assumption defies logic. Businesses like Charter that are trying to reach customers to inform them about various broadband services that are available, have no interest in harassing, annoying, and mistreating current customers.

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[81] Wisconsin A.G. Comments at 17 (citing ¶ 3 of the *TCPA Order*).

[82] *TCPA Order* at ¶ 91 (emphasis added).

[83] *Id.*

[84] *Id.* at ¶ 90 (emphasis added).

[85] Wisconsin A.G. Comments at 17.

Rational, profit-maximizing businesses will not risk offending customers by calling too frequently, and certainly not after a customer has requested to be placed on its company-specific do not call list. Charter only calls its customers occasionally and typically only to inform them of a new product or service available in their area – something that its customers frequently welcome. Charter is well aware that if it does not maintain good customer relations and honor customer requests for privacy, it will lose its customers to other communications providers.

IV. The Eleventh Amendment Does Not Prohibit this Action

The Wisconsin A.G. wrongly claims that the Eleventh Amendment bars the Commission from considering CBA's petition.[86] For a state to be protected by the Eleventh Amendment in an agency proceeding, the proceeding must be similar to civil litigation.[87] This means the proceeding must entail, among other things, "many of the same safeguards as are available in the judicial process," be "adversary in nature," and be "conducted before a trier of fact insulated from political influence."[88] The current proceeding is not an adjudicative proceeding under Eleventh Amendment jurisprudence. It bears no resemblance to civil litigation.

A case on point is *Tennessee v. U.S. Dept. of Transportation (USDOT)*.[89] In *Tennessee*, the Sixth Circuit held that a federal preemption proceeding concerning the Tennessee Hazardous Waste Management Act and the federal Hazardous Materials Transportation Act was "simply not an 'adjudication.'"[90] Rather, it was an "administrative interpretation of a federal statute."[91] The Court found the proceeding fell "within the rule-making process lying at the center of the

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[86] Wisconsin A.G. Motion to Dismiss and Comments in Support.

[87] *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 759 (2002).

[88] *Id.* at 756-57.

[89] 326 F.3d 729 (6th Cir. 2003).

[90] *Id.* at 734.

[91] *Id.* at 736.

responsibilities of federal executive agencies," and "serve[d] the valuable function of allowing an agency . . . to interpret federal legislation that it is authorized to enforce."[92] In addition, it also lacked traditional aspects of civil litigation.[93]

CONCLUSION

For the reasons set forth above, Charter respectfully submits that the Commission should preempt those Wisconsin telemarketing laws regulating interstate communications that are more restrictive than the Commission's rules.

Respectfully submitted,

CHARTER COMMUNICATIONS, INC.

/s/

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[92] *Id.*

[93] The court found there was "no adjudication of rights and responsibilities of different parties," the State was "in no way required to participate in the determination," and the decision-maker here is acting under the authority of the executive branch "charged with the duty of furthering the purpose of the federal legislation at issue." *Id.* at 735 -36.